Supreme Court, U.S.
FILED

991002 DEC 13 1999

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

CORPORAL FRANCISCO J. LOPEZ, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

DALE OWEN HARRIS
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve
Counsel of Record

CURTIS M. ALLEN
Captain, U.S. Marine Corps
Counsel for Petitioner

Navy-Marine Corps Appellate
Defense Division
Washington Navy Yard,
716 Sicard St. SE, ste. 1000
Washington, D.C. 20347
(202) 433-4161

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE ARMED FORCES ERRED IN AFFIRMING THE DECISION OF THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS, WHICH FAILED TO HONOR ITS STATUTORY OBLIGATION BY RESOLVING THAT ITS SCOPE OF REVIEW DID NOT INCLUDE THE FULL RANGE OF SENTENCING CONSIDERATIONS, TO INCLUDE CONSIDERATION OF CLEMENCY

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Corporal Francisco J. Lopez, U.S. Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces, __ M.J. __, No. 990524/MC (C.A.A.F. September 14, 1999) is not yet published and is located at Appendix A (App. 1a-2a). The opinion of the Navy-Marine Corps Court of Criminal Appeals, No. 9602454 (N.M.Ct.Crim.App. February 9, 1999)(unpublished opinion), is located at Appendix B (App. 3a-10a).

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on September 14, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTE INVOLVED

10 U.S.C. § 866(c), Article 66(c), Uniform Code of Military Justice, [hereinafter UCMJ], provides in pertinent part:

> [The Court of Criminal Appeals] may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

STATEMENT OF THE CASE

Appellant was a Motor Transport Driver assigned to Headquarters and Service Battalion, 1st Force Service Support Group, Camp Pendleton, California at the time of the events leading to his court-martial. (Record at 34.) On Friday 29 December 1995 at about noon, Appellant secured from his unit for the New Years holiday and accompanied two other Marines to El Centro, California. (Prosecution Exhibit 1, ¶ 1) Appellant then picked up his vehicle from his mother's home in El Centro and proceeded to Mexicali, Mexico, where he expected to spend the extended New Year's weekend with friends and relatives. *Id.* En route from Camp Pendleton to Mexicali, Appellant consumed approximately one dozen 12 ounce cans of beer and a single one ounce shot of liquor. *Id.*

Appellant and two friends arrived in Mexicali at about 8 p.m. *Id.* Appellant and his friends drove around the city in his vehicle listening to music, visiting friends and drinking alcohol. *Id.* Appellant consumed two 40-ounce bottles of Mexican beer prior to midnight. *Id.* In an intoxicated state, Appellant attempted to pass another vehicle, collided with the other vehicle, swerved into a group of bystanders and crashed into a fence. (Record at 37; Prosecution Exhibit 1, ¶ 3.) Appellant left the scene of the accident and was apprehended at the border by the U.S. Border patrol. (Record at 48; Prosecution Exhibit 1, ¶ 3.) Later, Appellant learned that the accident killed four people and injured two others.

Appellant was charged with and pled guilty to drunk driving, four specifications of involuntary manslaughter, two specifications of aggravated assault with a motor vehicle, fleeing the scene of an accident and obstruction of justice, violations of Articles 111, 119, 128 and 134, UCMJ. [10 U.S.C. §§ 911, 919, 928 and 934].

He was sentenced to 40 years confinement, forfeiture

of all pay and allowances, reduction to the lowest enlisted rank and a dishonorable discharge. In accordance with a pretrial agreement, the convening authority suspended confinement in excess of 30 years for the time of Appellant's confinement plus 12 months.

On February 9, 1999, the Navy Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Lopez*, No. 9602454 (N.M.Ct.Crim.App. February 9, 1999)(unpub. op.). The United States Court of Appeals for the Armed Forces affirmed the decision of the United States Navy Marine Corps Court of Criminal Appeals on September 14, 1999. *United States v. Lopez*, __ M.J. __, No. 990524/MC (C.A.A.F. September 14, 1999).

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Armed Forces erred in affirming the decision of the Navy-Marine Corps Court of Criminal Appeals, which failed to honor its statutory obligation by resolving that its scope of review did not include the full range of sentencing considerations, to include consideration of clemency

By abdicating its duty under Article 66(c), UCMJ to "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact" the Court of Criminal Appeals is trying to subvert the Uniform Code of Military Justice and the intent of Congress by recasting itself as an Article III appeals court.

Congress imbued the Courts of Criminal Appeal with awesome, plenary, *de novo* powers to review the findings and sentences of courts-martial. The Uniform Code of Military Justice was created by Congress under its Article I power to make rules for the government and regulation of the land and naval forces. The unique provisions of the UCMJ exist in order to ensure justice for servicemembers who, due to military necessity, are not afforded the same rights and legal protections as civilians, tried in Article III courts. *Willenbring v. Neurauter*, 48 M.J. 152, 157 (1998).

In order to countenance servicemembers' necessary loss of rights at the trial level, Congress granted the Courts of Criminal Appeal extraordinary power and the concomitant duty to exercise that power under Article 66(c), UCMJ. Article 66(c) requires a Court of Criminal Appeals to review the findings and sentence of every case[1] before it for factual

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[1] In Fiscal Year 1996, the four Courts of Criminal Appeal

and legal sufficiency, and that in exercising the duty imposed by its "awesome, plenary, *de novo* powers of review," the court may determine controverted questions of fact and **substitute its judgment for that of the military judge, or court-martial members**. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (emphasis added).

A clearer *carte blanche* to do justice would be difficult to express. *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991). This mandate to ensure justice is done has led the Court of Appeals for the Armed Forces to characterize the Courts of Criminal Appeal as something like the proverbial 800-pound gorilla[2] when it comes to their ability to guarantee that an accused is treated fairly. *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993). This responsibility to ensure both procedural and substantive justice is necessary because of the insular nature of the military justice system and the limited applicability of many procedural rights that characterize the civilian criminal justice system.

At times the Court of Appeals for the Armed Forces has found it necessary to remind the lower courts of their power and responsibilities under Article 66, UCMJ. For example, when the lower courts have deferred to the factfinder at the trial level on issues of the factual sufficiency of the evidence, the Court of Appeals for the Armed Forces has reiterated the duty of the lower courts to give no deference to the factfinder's determinations, pursuant to the mandate of Article 66(c). *See, e.g., United States v.*

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reviewed 3,738 cases. Of that number, the Navy-Marine Corps Court of Criminal Appeals reviewed 2,090 cases. Review by Courts of Criminal Appeals is mandatory where a punitive discharge or confinement for more than one year is adjudged.

2 Where does an 800-pound gorilla sit? Anywhere it wants to.

Martinez, 50 M.J. 344 (1998)(summary disposition); *United States v. Cole*, 31 M.J. 270, (C.M.A. 1990); *United States v. Turner*, 25 M.J. 324(C.M.A. 1987).

The lower court's duty to take a fresh look at a court-martial, from both a legal **and factual** standpoint applies to sentences as well. Courts of Criminal Appeal may "affirm only...such sentence...as it finds correct in law and fact and **determines...should be approved**". Article 66(c), UCMJ (emphasis added). Not only must the lower court determine that a sentence is legal, but it must place itself in the stead of the sentencing authority and reevaluate the factual aspects of sentencing, just as it does for findings. In doing so, the court may substitute its judgement on sentencing for that of the military judge or members and may consider the full range of sentences as well as the full range of sentencing philosophies, including mitigation, forbearance, or clemency.

In summarily affirming the lower court's opinion, the Court of Appeals for the Armed Forces has declared that the Courts of Criminal Appeal are barred from considering the full range of sentencing philosophies in assessing the factual correctness of the sentence. In a military that is growing increasingly insular and detached from civilian society, this marginalization of the equitable powers of the Courts of Criminal Appeal undermines the essential protection Congress built into the military justice system.

Citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988), the lower court asserted that "clemency" is not within its powers. The reliance on *Healey* is erroneous. *Healey's* holding is that only the convening authority can act on clemency matters that are **outside** the record of trial.[3]

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3 *Healey* involved the submission of 25 letters directly to the Air Force Court of Military Review, which pertained to appellant's good behavior during his post-trial confinement, recommending a

In *United States v. Lanford*, 6 U.S.M.C.A. 371, 20 C.M.R. 87 (1955) the Court of Military Appeals [now the Court of Appeals for the Armed Forces] squarely addressed the issue of what a Court of Criminal Appeal may consider when executing its duties under Article 66(c) regarding the sentence of a court-martial. *Lanford* both upholds the language of Article 66(c) as applying to sentencing matters and points out the semantical folly of labeling the lower court's proper power to lessen a sentence. "The board of review, [renamed the Court of Criminal Appeals] therefore, can be compassionate; it can be lenient; it can be forbearing. If one prefers to call the influence of those human qualities in the mitigation of a sentence the exercise of the judicial function of determining legal appropriateness, the description is proper. On the other hand, if one wishes to call it clemency, that description also is proper." *Lanford*, 20 C.M.R. at 94, 95 (internal citation omitted).

The intentions of the drafters of the Uniform Code of Military Justice also support the plain meaning of Article 66(c) that the service Courts of Criminal Appeal's broad powers extend to all aspects of sentencing.

One of the issues faced by the drafters of the UCMJ was the problem that the convening authority had final authority over the findings and sentence. Being the person who referred the charges and appointed the court, the convening authority would not always be the best person to give the final review of the court-martial. In the words of Professor Arthur Keefe of Cornell Law School, "It is not so much that innocent men are convicted as that outrageously long sentences are given by the trial court"[4] Article 66(c)

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reduction in confinement.

[4] Uniform Code of Military Justice: Hearings on H.R. 2498 before a subcommittee of the

places within the Courts of Criminal Appeals the power and duty to reexamine the findings and sentence of the trial court without influence by the convening authority.

Maj. Gen. Thomas Green, the Judge Advocate General of the Army, recognized exactly what the proposed Article 66(c) called for. It authorized the Courts of Criminal Appeal to "disapprove or mitigate legal sentences which have been approved by responsible senior commanders" and authorized them to "consider other than legal matters in determining what part of a finding or the sentences should be approved."[5] General Green urged the subcommittee "to leave the power to commute and consider nonlegal matters with a confirming authority" and not with the Courts of Criminal Appeal. *Id.*

General Green proposed a different Article 66 limiting a board of review (later Court of Criminal Appeal) to decide only the legal sufficiency of the findings or the sentence. *Id.* at 271. Notwithstanding General Green's objection to the power Courts of Criminal Appeal would have under Article 66(c), his suggested changes were not made and the Article was enacted into law with the intended powers of the Courts of Criminal Appeal intact.

The general considerations involved in the balancing of the military's need for an expedient disciplinary system and the right of servicemembers to a just system indicates the error of the lower court. Moreover, the

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Committee on Armed Services, 81st Cong. 840 (1949) (statement of Professor Arthur Keefe, Cornell Law School).

5 *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Committee on Armed Services,* 81st Cong. 258 (1949) (statement of Major General Thomas Green, Judge Advocate General of the Army).

language of Article 66(c), UCMJ and the specific provisions for ensuring justice in the review of courts-martial direct the same conclusion. It is within the power and duty of a Court of Criminal Appeal to approve only so much of a sentence that is correct in law and fact. The court's analysis may include **any** consideration, including mitigation, forbearance or clemency.

CONCLUSION

The lower court's decision dangerously erodes the protections the drafters of the UCMJ gave to servicemembers regarding the power and responsibilities of the Courts of Criminal Appeal. The long-recognized duty of a Court of Criminal Appeal to place itself in the stead of the finder of fact, with **all** the factfinder's powers, without deference to the finder of fact applies equally to its duty to put itself in the stead of the sentencing authority.

The Court of Criminal Appeal's duty applies equally to findings and sentence to: "affirm only such **findings of guilty and the sentence** or such part or amount of the sentence, as it finds correct in **law and fact** and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ (emphasis added).

In this case the Court of Criminal Appeal abdicated its Article 66 duties regarding sentencing. In the past when a Court of Criminal Appeal has abdicated its duties regarding Article 66(c), UCMJ it has been corrected. *See, e.g., United States v. Martinez*, 50 M.J. 344 (1998)(summary disposition); *United States v. Cole*, 31 M.J. 270, (C.M.A. 1990); *United States v. Turner*, 25 M.J. 324(C.M.A. 1987).

In this case the Court of Appeals for the Armed Forces failed to correct this error. During this, the 50th anniversary of the UCMJ, this Court should grant review of this issue. This is essential to correct the error of the Court of Appeals for the Armed Forces, protect the statutory rights of servicemembers and ensure that Courts of Criminal Appeal continue to attend to their duties under Article 66, UCMJ.

Respectfully submitted,

DALE OWEN HARRIS
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve
Counsel of Record

CURTIS M. ALLEN
Captain, U.S. Marine Corps
Counsel for Petitioner

Navy-Marine Corps Appellate
Defense Division
Washington Navy Yard,
716 Sicard St. SE, ste. 1000
Washington, D.C. 20347
(202) 433-4161

December 1999

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
WASHINGTON, D.C. 20442-0001

UNITED STATES,	) USCA Dkt.
	) No. 99-0524/MC
Appellee	)
	) Crim.App. No. 96-2454
v.	)
	) ORDER
Francisco J.	)
LOPEZ (564-41-0894)	)
Appellant	)

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is, by the Court, this 14th day of September, 1999,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (ALLEN)
Appellate Government Counsel (ROSENBERG)

APPENDIX B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

R.B. LEO R.H. TROIDL D.A. ANDERSON

UNITED STATES

v.

Francisco J. LOPEZ, 564 41 0894
Corporal (E-4), U.S. Marine Corps

NMCM 96 02454 Decided 9 February 1999

Sentence adjudged 15 May 1996. Military Judge: T.G. Hess. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Force Service Support Group, MarForPac, Camp Pendleton, CA.

CAPT CURTIS M. ALLEN, USMC,
Appellate Defense Counsel
LT KEVIN S. ROSENBERG, JAGC, USN,
Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have examined the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Art. 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c) (1994).

The appellant was convicted, in accordance with his pleas, at a general court-martial before a military judge alone of drunk driving, four specifications of involuntary manslaughter, two specifications of assault with a means or force likely to produce death or grievous bodily harm, wrongfully leaving the scene of an accident without making his identity known, and wrongfully endeavoring to impede an investigation, in violation of Articles 111, 119, 128, and 134, UCMJ. He was sentenced to confinement for 40 years, total forfeitures, reduction to E-1, and a dishonorable discharge. The convening authority approved the sentence. However, pursuant to the pretrial agreement, confinement in excess of 30 years was suspended for the period confinement and 12 months thereafter.

I.

In his first assignment of error, the appellant contends that the military judge erred by considering uncharged misconduct during sentencing. We disagree and find that the assignment of error is without merit.

During the providence inquiry, the appellant stated, in response to the military judge's question, that his truck was not insured at the time of the fatal accident. This exchange

occurred in the context of whether the appellant had any justification or excuse for leaving the scene of the accident. The appellant indicated that it was not the reason he left. In accordance with *United States v. Holt*, 27 M.J. 57, 60 (C.M.A. 1988), the trial counsel later requested, without defense objection, that the information elicited during the providence inquiry be considered by the court on sentencing.

Absent plain error, the admission of this evidence on sentencing was waived by the appellant's failure to object. MIL. R. EVID. 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). To the extent that this rather insignificant piece of information was included in the providence inquiry, we seriously doubt that the military judge gave it more than passing consideration in light of all the compelling evidence which was offered in aggravation. The potential prejudice to the appellant was, at best, *de minimis*. Accordingly, we find that the military judge did not abuse his discretion in admitting this evidence on sentencing.

II.

In his second assignment of error, the appellant contends that the military judge failed during the providence inquiry to properly resolve a potential "lack of mental responsibility" defense based upon involuntary intoxication. We disagree and find that the assignment of error is without merit.

For this court to find a plea improvident, the record of trial must "show a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The mere possibility of a defense is not enough; the defense must be "reasonably raised" by the

accused's testimony during the providency inquiry. *United States v. Roane*, 43 M.J. 93, 98-99 (1995).

The appellant stated that he was intoxicated at the time of the accident, that his consumption of the alcohol was voluntary, and that he was not suffering from alcoholism or any other type of severe mental disease or defect. His recall of the details of the evening in question was clear and concise. Based upon the record, we find no substantial basis to question the appellant's guilty pleas and further find that the military judge did not abuse his discretion in accepting the pleas.

III.

In his third assignment of error, the appellant contends that a sentence which includes confinement for 40 years is inappropriately severe for a case of unintentional homicide. We disagree and find that the assignment of error is without merit.

Our duty is not to exercise clemency, but to determine the appropriateness of the sentence awarded. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988) "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserved." *Id.* at 395. This process requires the "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(internal quotation marks and citation omitted).

Based upon the record, we believe that the sentence which the appellant received is not inappropriately severe, notwithstanding the fact that the homicides resulted from

culpable negligence. Had the homicides been intentional, we are certain that he would have received even more confinement. The number of deaths, the extent of the injuries to the survivors, the youthful age of the victims, and the evidence of the devastating emotional impact upon their families provide a reasonable basis for the sentence. Accordingly, we find that the sentence is not inappropriately severe.

IV.

In his fourth assignment of error, the appellant contends that the military judge erred in admitting various gory and inflammatory photos, Prosecution Exhibits 5 to 9, on sentencing which depicted the accident victims when the appellant had already admitted his guilt to the offenses. We disagree and find that the assignment of error is without merit.

First of all, the trial was before a military judge alone, who is presumed to know the law and apply it appropriately to the evidence before him. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994). Second, the challenged exhibits were admitted without defense objection. Since, we find no plain error, the objection was waived. Accordingly, the military judge did not abuse his discretion in admitting these exhibits.

V.

In his fifth assignment of error, the appellant contends that the 1996 amendments to Article 57, UCMJ, and the addition of Article 58b, UCMJ, violate the *ex post facto* clause of the Constitution. Since the appellant's offenses occurred prior to the effective date of these changes, we agree that the

Appellant is entitled to administrative review of his claim and, if appropriate, restoration of any property illegally taken from him. See *United States v. Gorski*, 47 M.J. 370 (1997).

VI.

In his sixth assignment of error, the appellant contends that the pretrial agreement is void for public policy because a suspension period of 30 years plus 12 months following release is unreasonably long. We have held that "[p]lacing an appellant on probation for the entire period of his confinement is reasonable as a control and motivating measure and is not violative of public policy." *United States v. Ratliff*, 42 M.J. 797, 802 (N.M.Ct.Crim.App. 1995). Having considered the appellant's claim, we find it to be without merit.

VII.

In a supplemental assignment of error, the appellant contends for the first time that he was punished while in pretrial confinement, in violation of his constitutional and statutory rights. We disagree and find that the assignment of error is without merit.

The appellant was in pretrial confinement from 3 January until 15 May 1996, in Special Quarters One, the maximum custody section of the brig. He now lists, in detail, his complaints concerning the conditions of his confinement. *See* Motion to Attach Documents and Leave to File Supplemental Assignment of Error dated 17 June 1998 (granted by this court on 25 June 1998).

Article 13, UCMJ, prohibits two types of activities against an accused prior to trial: (1) actions taken with the

intent to punish him before an adjudication of guilt has been made, and (2) unduly harsh conditions of pretrial confinement which, if sufficiently egregious, "may give rise to a permissible inference that an accused is being punished, or may be so excessive as to constitute punishment." *United States v. McCarthy*, 47 M.J. 162, 165 (1997)(citations omitted). The appellant's complaint appears to be of the second type.

The conditions of pretrial restraint for maximum custody detainees are admittedly harsher than those for lesser custody detainees. *See* Secretary of the Navy Instruction 1640.9A of 16 February 1983, Subj: Department of the Navy Corrections Manual, Art. 4201.3 at 4-7. However, unless we find these conditions to be "arbitrary or purposeless" and "not reasonably related to a legitimate governmental objective," we will not infer that they rise to the level of impermissible pretrial punishment. *McCarthy*, 47 M.J. at 167.

In this case, the appellant was suspected of a multiple homicide arising from a motor vehicle incident in Mexico. He fled back to the United States and attempted to conceal his involvement in that incident before he was apprehended. The Government has set forth adequate reasons to justify his placement in maximum custody. Supplementary Affidavit of CWO3 Mershon dated 22 January 1999. The specific conditions about which the appellant complains also have been addressed by the Government. While they are not disputed, the Government has explained in sufficient detail the reasons why they exist. *See* Affidavit of CWO3 Mershon dated 3 August 1998. Based upon this record, we do not find the conditions of the appellant's pretrial confinement to be so egregious as to infer that he was being punished, nor do we find these conditions to be so excessive as to constitute

punishment.

VIII.

We affirm the findings and the sentence, as approved on review below. The record of trial is returned to the Judge Advocate General of the Navy for appropriate administrative review and remedial action, as may be required.